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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 924

MARICOPA BY-PRODUCTS, INC., W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, and ANAHEIM CITRUS PRODUCTS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich
114 West Adams Street
Phoenix, Arizona
Attorneys for Petitioners

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The memorandum for the United States in opposition to the petition for a writ of certiorari seeks to minimize the importance of the issues presented by the petition. The memorandum simply ignores petitioners' basic contention that the personal Fifth Amendment privilege against self-incrimination possessed by individual shareholder-officers who directly participate in the day-to-day activities of their closely held corporation extends to records of their corporation so as to prevent discovery of them, where the Government has announced its intention to use the records to inquire as to possible personal criminal conduct of the shareholder-officers as well.

Contrary to the Government's claim that "none of the cases

cited by petitioners supports their contention that the validity of this rule [that production of corporate records cannot be defeated by a claim of personal self-incrimination of their custodian] has been questioned or should be reexamined by this Court," (Memorandum in Opposition, p. 2) the Court has granted certiorari on January 22, 1968, in *Mancusi v. DeForte* (No. 844, October Term, 1967). In *Mancusi*, the District Court had denied a petition for habeas corpus on the ground that petitioner, an officer of a labor union, lacked standing to object to the admission against him personally of the union's records that had been obtained as the result of an illegal search and seizure. The Court of Appeals reversed, holding that DeForte had standing to challenge the illegal search and seizure that was directed at him. His right of privacy protected by the Fourth Amendment was held to be invaded by the unwarranted action of State officials. The Court of Appeals remanded the case for issuance of a writ of habeas corpus. *United States ex rel. DeForte v. Mancusi*, 379 F.2d 897 (2d Cir. 1967). On petition for certiorari, the questions presented were:

"(1) Did seizure of union records pursuant to subpoena duces tecum violate Fourth Amendment rights of union official even though such records were seized from union offices and were admittedly not his personal property?

"(2) Should extension to union or corporate officials of standing to object to seizures of union or corporate records from union or corporate premises be enunciated in federal habeas corpus proceedings challenging final state court judgment of conviction?" 36 U.S.L.W. 3294 (Jan. 23, 1968).

The question presented in the present petition is:

"Whether the shareholder-officers of a closely held corporation, who are in actual close personal contact with the matters called for by a grand jury subpoena duces tecum issued in the course of an anti-trust investigation and with the day-to-day operation of the corporation, can assert their own personal privilege against self-incrimination as to the production of documents which may, as a practical matter, incriminate them personally."

The present case concerns the scope of Fifth Amendment privi-

lege against self-incrimination as applied to shareholder-officers of a closely held corporation rather than the scope of Fourth Amendment protection against unreasonable searches and seizures as applied to an officer of a labor union. The underlying considerations are, however, identical.[1] In the present case, as in *Mancusi*, the Government has admitted that its subpoena is directed against the individual petitioners; its purpose in seeking the corporate records is to learn of individual violations of the antitrust laws as a result of its inspection of the corporation's records. (Hearing, January 23, 1967, T. 8; Respondent's Answering Brief in the Court of Appeals, 12; R. 41).

Since *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed 2d 441 (1963), there is no longer any distinction between an initial invasion or unlawful action leading to an unlawful search and seizure and evidence obtained in violation of the privilege against self-incrimination. 371 U.S. at 485-88. The *Mancusi* case therefore, involving the Fourth Amendment rights of a union officer, is directly analogous to the present case, which involves the Fifth Amendment rights of the officers of a closely held corporation who themselves are in actual direct contact with the records that are sought to be obtained. Where, as here, compliance by Maricopa with the subpoena duces tecum would constitute a "real and appreciable" personal hazard of self-incrimination to its few shareholder-officers, their personal privilege against self-incrimination should extend so as to prevent the production of the corporate records demanded by the subpoena. See *Haynes v. United States*, 28 U. S. S. Ct. Bull. B. 812, 823 (January 29, 1968); *Grosso v. United States*, 28 U.S. S. Ct. Bull. B. 854, 857 (January 29, 1968); *Marchetti v. United States*, 28 U.S. S. Ct. Bull. B. 863, 871 (January 29, 1968)

In view of the granting of the petition for certiorari in *Mancusi*, its recent decisions in *Haynes*, *Grosso* and *Marchetti*, *supra*, and the standing of the Fifth Amendment privilege as the essential

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[1]The present case does not, however, involve the issue whether the protection sought extends to habeas corpus proceedings following a final state court judgment of conviction.

mainstay of the American system of accusatorial, not inquisitorial, prosecution, *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964), the Court should also grant certiorari in this case to consider the Fifth Amendment questions presented by it.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON
By John P. Frank
John J. Flynn
Paul G. Ulrich
114 West Adams
Phoenix, Arizona
Attorneys for Petitioners

February, 1968

CERTIORAR

DENIED